UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIND MEDICINE (MINDMED) INC., Plaintiff, v. SCOTT FREEMAN, JAKE FREEMAN, CHAD BOULANGER, FARZIN FARZANEH, VIVEK JAIN, ALEXANDER WODKA, and FCM MM HOLDINGS, LLC, Defendants.	Case No. 1:23-CV-07875 (DLC)

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

The Motion to Dismiss filed by Scott Freeman, Jake Freeman, Chad Boulanger, Farzin Farzaneh, Vivek Jain, Alexander Wodka, and FCM MM Holdings, LLC ("FCM") (collectively, "Defendants") is notable in the challenges it does *not* raise to the First Amended Complaint ("FAC").

Defendants do not dispute, for instance, that the FAC adequately pleads that their proxy solicitation materials were replete with materially false and/or misleading misstatements and omissions. Defendants also do not dispute that the FAC adequately pleads that Mind Medicine (MindMed) Inc. ("MindMed" or the "Company") spent millions of dollars that would otherwise have been directed to MindMed's core business activities—activities that generate shareholder value—in responding to and correcting Defendants' misstatements and omissions. Instead, Defendants take the extraordinary position that the Court should turn a blind eye to their misconduct based on an extremely narrow reading of the federal securities laws—one that would gut Section 14(a) of its power to protect shareholders from voting on the basis of false information.

MindMed brought the instant action for redress against Defendants for their dissemination of misleading proxy solicitation materials in the proxy contest they initiated in April 2023 (the "2023 Proxy Contest") and to stop Defendants from lying to MindMed's shareholders in future proxy contests, which they have implicitly pledged to undertake and which could begin in a matter of months. MindMed's standing to bring this Section 14(a) action has been recognized universally in the context of injunctive relief and by the Southern District of New York in the context of monetary damages. Defendants concede this point, yet inexplicably ask the Court to hold that, as a matter of law, an issuer has no right to pursue damages under Section 14(a). No court in this District has so held, and this Court should not.

Defendants also attempt to situate their misconduct above the law through a restrictive reading of "transaction causation." Defendants argue that, although they purport to have succeeded in persuading a "significant" number of MindMed's shareholders, winning the "retail shareholder vote" in the 2023 Proxy Contest, and although they managed to delay the final certification of the vote in the 2023 Proxy Contest for over a month, they are beyond reproach because they did not persuade *enough* shareholders to install Dr. Freeman, Dr. Farzaneh, Mr. Jain, and Mr. Wodka (the "FCM Nominees") on MindMed's Board of Directors. In effect, Defendants ask the Court to not only allow the misinformation they previously disseminated to fester in the public forum indefinitely, but to give them a free pass to keep lying and causing delays in future proxy contests. No court has sanctioned conduct like this or permitted dismissal of meritorious claims in this context, and doing so here would create dangerous precedent.

Defendants' argument places form above substance and approaches Section 14(a) with blinders to the intent of the federal securities laws. To be sure, the FAC presents novel issues of law but that is because Defendants are not typical shareholders, and their campaign did not involve typical proxy materials. Over the course of the 2023 Proxy Contest, Defendants engaged in needlessly inflammatory and juvenile antics that made a mockery of the corporate suffrage process, all while flagrantly disregarding their obligation to tell the truth to MindMed's shareholders. Defendants now seek to contort Section 14(a) into a shield for their misconduct by creating a new legal standard: it is entirely lawful to lie, obfuscate, and delay in a proxy contest so long as you happen to lose. But imposing this limitation on Section 14(a) would not only contravene common sense, it would undercut the fundamental purpose of that law—to protect the right of shareholders to make decisions based on accurate information.

Accordingly, for the reasons discussed below, MindMed respectfully requests that the Court deny Defendants' Motion to Dismiss.

I. BACKGROUND

MindMed is a clinical stage biopharmaceutical company developing product candidates for the treatment of brain health disorders. FAC ¶ 22. Dr. Freeman briefly served as MindMed's President and Chief Medical Officer from September 2019 through August 2020. *See id.* ¶¶ 50, 56. In June 2020, MindMed's leadership received a complaint regarding Dr. Freeman's workplace behavior, and in August 2020, he was removed from the Company. *Id.* ¶ 52.

In August 2022, Dr. Freeman formed FCM with his then 20-year-old nephew Jake Freeman and Chad Boulanger to represent their interests adverse to MindMed and to engage in shareholder activism against MindMed. *See id.* ¶¶ 5, 65, 100.[1] On April 18, 2023, Dr. Freeman, Jake Freeman, and Mr. Boulanger entered into an agreement to make joint securities regulatory filings with Mr. Farzaneh, Mr. Jain, and Mr. Wodka. *See* FAC ¶ 70; FAC Ex. B at 26. Two days later, Defendants filed a preliminary proxy statement announcing their intention to seek election of a control slate of directors consisting of Dr. Freeman, Mr. Farzaneh, Mr. Jain, and Mr. Wodka to MindMed's board. *See* FAC ¶ 72; FAC Ex. B.

Between April 20, 2023 and MindMed's Annual General Meeting ("AGM") on June 21,

[1] Six months before they initiated the 2023 Proxy Contest, Dr. Freeman and FCM commenced a public harassment campaign against MindMed that included cavalierly disclosing MindMed's confidential information. *See* FAC ¶¶ 62, 65. In July 2023, MindMed initiated *Mind Medicine (MindMed) Inc. v. Scott Freeman and FCM MM Holdings, LLC*, No. 2:23-cv-01354 (D. Nev.) (the "Nevada Action"), asserting contract claims against Dr. Freeman and FCM arising from their repeated violations of the non-disparagement and confidentiality provisions of the Separation Agreement that Dr. Freeman executed upon his removal from the Company. *Id.* ¶ 63. In describing the Nevada Action, Defendants simply ignore MindMed's claims arising from Dr. Freeman's violations of his confidentiality obligations. *See* Mem. of Law in Supp. of Defs' Mot. to Dismiss, ECF No. 41 ("MTD") at 6-7. Moreover, the reassignment of the Nevada Action to a new judge in no way "effectively consolidated" the Nevada Action with *Freeman v. Hurst, et al.*, Case No. 2:22-cv-01433 (D. Nev.). *See id.* at 7. That claim is particularly confounding given that Dr. Freeman's Motion to Consolidate those two unrelated cases (which MindMed has vigorously opposed) is not even fully briefed. *See* Nevada Action, ECF Nos. 104 and 106.

2023, Defendants jointly filed proxy solicitation materials (the "FCM Proxy Solicitation Materials"), including proxy statements and additional materials such as press releases, social media posts, interviews, presentations, and letters directed to MindMed's shareholders. *See* FAC ¶¶ 72-74; FAC Exs. A-I and K-M. All seven Defendants are listed as filers on the FCM Proxy Solicitation Materials. *See* FAC Exs. A-I and K-M. As detailed in the FAC, the FCM Proxy Solicitation Materials were replete with materially false and/or misleading misstatements and omissions on a number of topics.[2]

First, the FCM Proxy Solicitation Materials contained misstatements and omissions relating to Dr. Freeman's experience, employment history, and qualifications. For example:

- Defendants omitted Dr. Freeman's overlapping and fleeting periods of employment at—and unexplained departures from—at least four past employers and falsely claimed that Dr. Freeman has brought multiple drugs to market, when in fact he was only involved in bringing Nexavar to market. *See* FAC ¶¶ 88-91. Defendants also significantly embellished Dr. Freeman's role in the Nexavar clinical trials. *See id.* ¶ 89.
- Defendants falsely claimed that Dr. Freeman has over a decade of experience in the

[2] Citing to a brief Dr. Freeman filed in the Nevada Action, Defendants interpolate numerous accusations in their "Factual Background" section that are not alleged in the FAC. *See* MTD at 4-5. In doing so, Defendants contend that "[the] Court may take judicial notice" of Dr. Freeman's brief in the Nevada Action. *Id*. at 3 n.2. Defendants' inclusion of these extrinsic accusations is plainly improper. *See Glob. Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 157 (2d Cir. 2006) (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir.1998)) ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings."). Further, Defendants' lack of reliance on any of these extrinsic "facts" in their legal arguments strongly suggests that they included these accusations solely to distract from the facts that are *actually* alleged in the FAC and thus relevant to their Motion. *See, e.g.*, MTD at 4-5 (citing to Dr. Freeman's Anti-SLAPP Motion in the Nevada Action to contend that Dr. Freeman "was falsely accused of a workplace violation" and "uncover[ed] misconduct by MindMed's management"). MindMed does not concede the veracity of these extrinsic accusations.

psychedelic field, when in fact his only experience in that field was his failed effort to develop 18-MC/MM-110, a compound without psychedelic properties. *See id.* ¶¶ 90-91.

- Defendants falsely claimed that Dr. Freeman developed MindMed's clinical strategy, when in fact MindMed's current clinical strategy was put in place *after* Dr. Freeman was removed from the Company. *See id.* ¶ 92.
- Defendants falsely claimed that Dr. Freeman voluntarily left MindMed and provided consulting services to the Company after his separation, when in fact he was forced to resign and has never provided consulting services to MindMed. *See id.* ¶¶ 92-93.

Second, the FCM Proxy Solicitation Materials contained misstatements and omissions relating to Defendants' engagement with MindMed prior to the 2023 Proxy Contest. For example:

- Defendants falsely claimed that Dr. Freeman, Jake Freeman, and FCM attempted to engage constructively and collaboratively with MindMed to avoid a proxy contest, when in fact they publicized their plan to initiate a proxy contest as early as September 2022 and used FCM's social media accounts to lob immature and obnoxious attacks at MindMed and its leadership in the months leading up to the 2023 Proxy Contest. *See id.* ¶¶ 95-101.
- Defendants failed to disclose that, in their "engagement" with MindMed prior to the 2023 Proxy Contest, Dr. Freeman, Jake Freeman, and FCM made absurd and unreasonable demands (such us calling for MindMed's CEO to resign by noon the following day); rejected multiple offers to nominate a mutually agreed upon independent director; and refused to accept anything less than 50% control of MindMed's Board. *See id.* ¶¶ 102-103.

Third, the FCM Proxy Solicitation Materials contained misstatements and omissions relating to MindMed's research and development pipeline. For example:

- Defendants blamed MindMed's current CEO Robert Barrow for the issues with the 18-

MC/MM-110 program but failed to disclose that Dr. Freeman led the development of that product for years and that Mr. Barrow only became CEO *after* Dr. Freeman's unsuccessful decade-long effort to develop 18-MC/MM-110 had ended. *See id.* ¶¶ 110-112.

- Defendants falsely claimed that Dr. Freeman was removed from his position at MindMed because he raised safety concerns about the 18-MC/MM-110 program, when in fact he was removed because of complaints about his workplace conduct and the subsequent discovery that he had misappropriated confidential MindMed information. *See id.* ¶ 114.
- Defendants falsely claimed that an outside consulting firm supported their proposed clinical path, when in fact the cited report clearly supported *MindMed's* development strategy. *See id.* ¶¶ 117,122.

Fourth, the FCM Proxy Solicitation Materials contained misstatements and omissions relating to MindMed's compensation policies, performance, and leadership. For example:

- Defendants falsely claimed that MindMed's compensation policies were out-of-line and out of step with the Company's performance, when in fact the Company's compensation policies were externally validated and over 80% of direct compensation in 2022 was "at risk" (*i.e.*, directly linked to MindMed's performance). *See id.* ¶¶ 123-126.
- Defendants misrepresented MindMed's performance relative to its peers, omitting that MindMed's drop in share value in 2022 was in line with sectoral trends and that MindMed's performance since it was listed on Canada's NEO Exchange in March 2020 has exceeded its peers. *See id.* ¶¶ 128-129, 132-133.[3]

[3] Defendants are *still* making these misleading claims, including in their brief in support of the instant Motion. *See* MTD at 5-6 (inserting graphic generated by Defendants that purportedly "demonstrates how MindMed's stock performed since its peak in June of 2021, when MindMed's current CEO, Rob Barrow, became interim CEO"). Of course, the inclusion of these claims is purely gratuitous, as they have no relevance to Defendants' legal arguments.

- Defendants falsely claimed that both Mr. Barrow and MindMed's current Chief Medical Officer Dan Karlin lack experience in drug development, when in fact Mr. Barrow has over a decade of experience in drug development, and Dr. Karlin has served in numerous relevant positions, including at Pfizer. *See* FAC ¶¶ 136-137, 141.
- Defendants misleadingly suggested that, in contrast to Dr. Freeman and his co-Defendants, Mr. Barrow and Dr. Karlin sell MindMed stock "monthly," omitting that Dr. Freeman sold almost four million MindMed shares in the two years preceding the 2023 Proxy Contest and that Mr. Barrow and Dr. Karlin only sold their shares through pre-arranged "sell to cover" transactions to satisfy tax obligations. *See id.* ¶¶ 138, 142-143.

Faced with Defendants' avalanche of misinformation, MindMed was forced to set the record straight and respond to these false and misleading statements, requiring the Company to expend millions of dollars on expenses related to the 2023 Proxy Contest that otherwise could have been spent on MindMed's core research functions—the fundamental value proposition in which the Company's shareholders invest. *Id.* ¶¶ 8, 152-153, 163.

Although Defendants ultimately lost the proxy contest, they assert that they succeeded in achieving, in the words of Dr. Freeman and FCM, "Significant Support from Shareholders." *Id.* ¶ 147; FAC Ex. N. On June 22, 2023, the day after the 2023 AGM, FCM and Dr. Freeman released a press release thanking their "fellow shareholders for their significant show of support at the AGM" and boasting that "FCM . . . won over 50% of the retail shareholder vote." FAC Ex. N at 2. In the same press release, FCM and Dr. Freeman vowed "to [c]ontinue [their] fight" against MindMed and to "continue to place pressure on MindMed." FAC ¶ 148; FAC Ex. N at 2.[4]

[4] In the ensuing months, Dr. Freeman and FCM have kept this promise, using the litigation privilege as a shield to continue broadcasting wild and baseless accusations against MindMed (including the claims inappropriately incorporated in the MTD at 4-5, *see* n.2 *supra*) across three

FCM and Dr. Freeman then proceeded to obstruct the final certification of the 2023 AGM voting results by stating their intent to challenge the tabulation of the voting results and then refusing to attend a scheduled meeting with the Inspector of Elections to present their purported challenges. *See* FAC ¶ 149. As a result, the final certification of the voting at MindMed's 2023 AGM was delayed until July 25, 2023, more than a month after the 2023 AGM. *See id.* ¶ 150.

Defendants have thus made clear that they have no intention of ending their disruptive and chaotic behavior, which will almost certainly include another proxy contest in which they disseminate materially false and misleading information. *Id.* ¶ 151. Defendants have also made no effort whatsoever to correct the lies they disseminated to MindMed's shareholders in the 2023 Proxy Contest, which remain in the public sphere. Accordingly, MindMed filed the instant case to obtain monetary damages stemming from Defendants' misconduct, to require Defendants to correct their prior misstatements, and to enjoin Defendants from committing future violations of Section 14(a) and Rule 14a-9 promulgated thereunder.

II. ARGUMENT

A. Defendants' Rule 12(b)(1) Motion Should Be Denied Because MindMed Has Standing to Bring This Action.

A complaint may only properly be dismissed "under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000). "[T]o satisfy Article III's standing requirements, a plaintiff must show 'injury in fact,' causation, and redressability." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC),*

separate lawsuits. For example, earlier this month, Dr. Freeman amended his complaint in an action to which MindMed is not even a party to insert unsupported and irrelevant allegations regarding unspecified "criminal" conduct by an array of current and former MindMed officers, directors, employees, and advisors who Dr. Freeman contends are conspiring against him. *See Freeman v. Hurst, et al.*, Case No. 2:22-cv-01433 (D. Nev.), ECF No. 141 ¶ 664.

Inc., 528 U.S. 167, 168 (2000). When assessing standing on a motion to dismiss, "[a]ll allegations made in the complaint are accepted as true and construed in favor of the plaintiffs." *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 184 (2d Cir. 2020).[5]

1. MindMed is entitled to recover damages.

Defendants argue that the FAC should be dismissed pursuant to Rule 12(b)(1) because MindMed, as an issuer of securities, lacks Article III standing to sue for damages under Section 14(a) and Rule 14a-9. *See* MTD at 12-13. In support of this argument, Defendants cite a splattering of out-of-circuit cases while simultaneously conceding that "courts in the Second Circuit have held that an issuer has standing to assert a § 14(a) claim for damages[.]" *Id.* at 13. As Defendants acknowledge, an issuer's standing to bring suit for monetary damages under Section 14(a) and Rule 14a-9 has been established in this Circuit. This precedent also comports with Supreme Court jurisprudence and the legislative history of Section 14(a).

The Supreme Court first recognized the private right of shareholders to bring suit under Section 27 of the Securities Exchange Act for violation of Section 14(a) in *J. I. Case Co. v. Borak*, 377 U.S. 426, 430–31 (1964). In arriving at its decision in *Borak*, the Court noted that a shareholder's injury for purposes of Section 14(a) may be derivative or direct. 377 U.S. at 432 (a shareholder's injury under Section 14(a) "ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder"). This reasoning aligns with Congress's intent in enacting Section 14(a) to "protect investors from promiscuous solicitation of

[5] Defendants' brief alternates between Rule 12(b)(6) and Rule 12(b)(1) arguments for dismissal. *See* MTD §§ II-V. Because standing is a threshold issue, we address Defendants' Rule 12(b)(1) arguments first. *See In re Currency Conversion Fee Antitrust Litig.*, 2009 WL 151168 at *2 (S.D.N.Y. Jan. 21, 2009) ("A court presented with a motion to dismiss under both Rule 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction.").

their proxies, on the one hand by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporate officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts." S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934). Two years after *Borak*, Judge Friendly, opining for the Second Circuit, clarified that "[i]f § 27 Securities Exchange Act authorizes a stockholder to assert . . . a claim on the corporation's behalf . . . it must also authorize the corporation to do so on its own." *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 695 (2d Cir. 1966) (Friendly, J.); *see also GAF Corp. v. Milstein*, 453 F.2d 709, 719 (2d Cir. 1971) ("We have already held that an issuer has standing to assert violation of section 14(a), governing proxy contests[.]").

More recently, the Southern District of New York in *Enzo Biochem, Inc. v. Harbert Discovery Fund, LP* clarified the type of relief available to issuers for violations of Section 14(a), holding that, in addition to injunctive relief, "an issuer has Article III standing to sue for monetary damages under Section 14(a) for alleged violations of Rule 14a-9." 2021 WL 4443258, at *6 (S.D.N.Y. Sept. 27, 2021) (Crotty, J.) ("*Enzo 1*"). In arriving at the holding in *Enzo 1*, the court reasoned that "recognizing an issuer's right of action for money damages under Section 14(a) would comport with the congressional intent identified in *Borak* of protecting 'fair corporate suffrage' and 'the voting rights of shareholders.'" *Id.* (citing *Koppel v. 4987 Corp.*, 167 F.3d 125, 135-36 (2d Cir. 1999)). Further, it emphasized that "an issuer, as opposed to individual shareholders, would typically be better situated in terms of resources and corporate influence to pursue litigation under Section 14(a) and as a result, enforce the 'fair corporate suffrage' policies undergirding the statute." *Enzo 1*, 2021 WL 4443258, at *6.

Enzo 1 also distinguished the public policy concerns raised in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), explaining that the "threats of speculative claims and procedural intractability" that led the Court in *Virginia Bankshares* to decline to recognize a private right of action under Section 14(a) for minority shareholders whose votes were not required by law or corporate regulations to authorize the corporate transaction at issue did not apply because "a suit for money damages brought by an issuer under Section 14(a) would proceed just like any other *Borak* action—except of course that the plaintiff would be an issuer and not a shareholder." *Enzo 1*, 2021 WL 4443258, at *7.

Against this precedent, it is clear that MindMed has standing to sue for monetary damages for Defendants' violations of Section 14(a). Indeed, MindMed is best suited to seek redress for Defendants' wrongdoing because it is "better situated in terms of resources and corporate influence to pursue litigation under Section 14(a)," *id.* at *6, than MindMed's individual shareholders, many of whom are retail investors, *see* FAC ¶ 76.

Defendants attempt to differentiate this precedent by arguing that "[n]o court in this Circuit has found that an issuer has standalone standing (*i.e.*, harm solely to the issuer without an injury to a shareholder)," MTD at 13, but this is a red herring. MindMed is seeking monetary damages to redress the millions of dollars it was forced to spend in rebutting Defendants' materially false and misleading statements and omissions in the 2023 Proxy Contest, *see* FAC ¶¶ 8, 153, 163, and injury to MindMed's shareholders "flows from the damage done the corporation," *Borak*, 377 U.S. at 432. MindMed explained precisely this fact in the FAC. MindMed's core business is the development of product candidates for the treatment of brain health disorders. FAC ¶¶ 2, 22-32. As a result of Defendants' misstatements and omissions, MindMed was forced to direct resources away from its core research functions, which, as explained in the FAC, are "the fundamental value proposition in which the Company's shareholders invest." *Id.* ¶ 153.

2. MindMed is entitled to equitable relief.

"Federal courts are empowered to 'grant all necessary remedial relief' to effectuate the purposes behind Section 14(a)[.]" *Kaufman v. Cooper Cos., Inc.*, 719 F. Supp. 174, 178 (S.D.N.Y. 1989) (quoting *Borak*, 377 U.S. at 435). This broad power includes the authority to order injunctive relief. *See Borak*, 377 U.S. at 432 ("[T]he possibility of . . . injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.").

Here, Defendants' misconduct is squarely within the bounds of what Section 14(a) was designed to regulate, and injunctive relief is appropriate both to correct the misinformation to which MindMed's shareholders have already been exposed and to prevent Defendants from disseminating further misinformation. *See Unite Here v. Cintas Corp*, 2006 WL 2859279, at *4 (S.D.N.Y. Oct. 6, 2006) (Cote, J.) (citing *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1198 (2d Cir. 1993)) ("The SEC promulgated [Rule 14a–9] with the goal of preserving for all shareholders who are entitled to vote, the right to make decisions based on information that is 'not false or misleading.' Section 14(a)'s broad remedial purposes include promotion of the free exercise of voting rights of stockholders and the protection of investors.") (citations omitted).

Defendants argue that (1) MindMed's claim for equitable relief is moot because the 2023 Proxy Contest is over and (2) MindMed has not adequately pled the elements of equitable relief to merit issuance of an injunction or order corrective disclosures. Both arguments are unavailing.[6]

a. MindMed's claim for injunctive relief is not moot.

Defendants argue that MindMed's request for equitable relief is moot because "the proxy campaign has concluded and is final." MTD at 17. This argument not only disregards the fact that

[6] While Defendants couch their entire equitable relief discussion in the context of standing (*see* MTD at 18), only their argument with respect to mootness and ripeness is properly evaluated under Rule 12(b)(1). Their other argument—that MindMed has not pled the elements of injunctive relief (*e.g.*, irreparable harm and success on the merits)—should be evaluated under Rule 12(b)(6). Nonetheless, MindMed addresses both arguments here to mirror Defendants' approach to the issue and to assist in ease of review.

Defendants have implicitly threatened to wage another proxy contest against MindMed, it prematurely calls for the resolution of factual issues at the core of MindMed's Section 14(a) claim.

"A suit for an injunction seeks not only to eliminate the effect of past wrongdoing, but also to prevent its recurrence." *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 951 (2d Cir. 1978) (citing *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *Swift & Co. v. U.S.*, 276 U.S. 311, 326 (1928)). This Circuit has specifically recognized that a Section 14(a) claim is not rendered moot because the transaction the proxy statements were directed towards has passed. *See, e.g.*, *In Rubenstein on Behalf of Jefferies Fin. Grp. Inc. v. Adamany*, 2023 WL 6119810, at *3 (2d Cir. Sept. 19, 2023) (Section 14(a) claim was not rendered moot by fact that the proxy statements related to election of directors whose terms had already expired given that plaintiff sought "prospective injunctive relief as to . . . future proxy statements.").

The day after the 2023 AGM, Defendants issued a press release vowing "to [c]ontinue [their] fight" against MindMed and stating that they will "continue to place pressure on MindMed." FAC ¶ 148; FAC Ex. N at 2. In other words, Defendants have affirmatively indicated that they intend to continue their activism against MindMed, which, given their conduct in the 2023 Proxy Contest, will likely include future violations of Section 14(a) and Rule 14a-9. *See* FAC ¶¶ 151, 154. This is particularly true in light of the fact that the entirety of MindMed's Board is elected on an annual basis, meaning that absent the Court's intervention, Defendants will soon have another opportunity to mislead MindMed's shareholders. *See* FAC ¶¶ 154-156.[7]

[7] Defendants' cited case law on this issue is inapposite. *See* MTD at 17-18. *Ramos v. N.Y.C. Dep't of Educ.*, 447 F. Supp. 3d 153, 157–158 (S.D.N.Y. 2020), held that the plaintiff's case was moot where the requested relief had already been ordered by an administrative agency. And *Thomas v. City of N.Y.*, 143 F.3d 31, 34-35 (2d Cir. 1998), dealt with a pre-enforcement facial challenge to a city ordinance that plaintiffs claimed would violate due process in the issuance and denial of licenses. In holding that the procedural due process claim was unripe, the court noted that "not one of plaintiffs' licenses has been denied." *Id.* at 35. Here, in contrast, the FAC details at length

In any event, Defendants' mootness argument is not appropriate for adjudication at this stage because it "calls for the resolution of delicate factual determinations that closely track the merits of this Section 14(a) lawsuit." *Enzo 1*, 2021 WL 4443258, at *4-5 (deferring adjudication of mootness argument that "implicate[d] . . . the past behavior of [the defendant] as an investor in the Company and whether that conduct raises the inference that it is likely to renominate directors to the Board in the future"). And because Defendants do not claim that they have divested themselves of their MindMed shares such that they are no longer capable of waging a proxy contest, their mootness argument is itself "speculative and unripe." *See* MTD at 17; *Enzo 1*, 2021 WL 4443258, at *5 ("[G]iven that [the defendant] still has a substantial ownership stake in the Company, Enzo's interest in obtaining prospective injunctive relief appears to be—at the very least—a plausible one that is worthy of careful consideration in light of the relevant facts.").

b. MindMed has adequately alleged it is entitled to injunctive relief.

To adequately plead a request for injunctive relief, a plaintiff must allege: "1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor, and 3) that the public's interest weighs in favor of granting an injunction." *Fasciana v. Cnty. of Suffolk*, 996 F. Supp. 2d 174, 185 (E.D.N.Y. 2014) (quoting *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir.2010)).

Where a plaintiff is seeking an injunction based on a "defendant's violation of a statute," it "is not required to show that otherwise rigor mortis will set in forthwith." *Studebaker Corp.*, 360

the harm already suffered by MindMed and its shareholders as a result of Defendants' false and misleading proxy materials, as well as the threat of continuing harm based on Defendants' promise to continue fighting. *See* FAC ¶¶ 8, 151-156.

F.2d at 698. "[A]ll that 'irreparable injury' means in this context is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired. . . . [T]hat is enough where . . . the only consequence of an injunction is that the defendant must effect a compliance with the statute which he ought to have done before." *Id.* MindMed has pled irreparable injury in at least three respects.

First, MindMed's "shareholders were forced to vote on the basis of a materially misleading Proxy. This alone establishes the irreparable harm sought to be prevented by § 14(a) of the Act." *Lichtenberg v. Besicorp Grp. Inc.*, 43 F. Supp. 2d 376, 390 (S.D.N.Y. 1999); *see also Lone Star Steakhouse v. Adams*, 148 F.Supp.2d 1141, 1150 (D. Kan. 2001) ("Monetary damages cannot restore the right of shareholders to effectively exercise their corporate suffrage rights.").

Second, even though Defendants did not prevail in the 2023 Proxy Contest, the misinformation they disseminated in the FCM Proxy Solicitation Materials are still in the public forum, thereby depriving MindMed's shareholders of the ability to make fully informed decisions about MindMed based on accurate information. *See* FAC ¶ 164. This information inaccuracy amounts to irreparable harm with respect to MindMed's future elections unless Defendants issue corrective disclosures. *See, e.g.*, *Delcath Sys., Inc. v. Ladd*, 2006 WL 2708459, at *5 (S.D.N.Y. Sept. 20, 2006), modified, 466 F.3d 257 (2d Cir. 2006) (recognizing that "the negative impression that has been conveyed to the shareholders by the false and misleading information disseminated during [proxy] contest" may constitute "irreparable injury to the incumbent board").

Third, while a violation of the securities laws is not always an indicator of irreparable harm, "[i]t is well-established that a transaction—particularly a change-of-control transaction—that is influenced by noncompliance with the disclosure provisions of the various federal securities laws can constitute irreparable harm." *MONY Grp., Inc. v. Highfields Cap. Mgmt., L.P.*, 368 F.3d

138, 147 (2d Cir. 2004). Here, the misstatements and omissions in the FCM Proxy Solicitation Materials were aimed at effecting a change-of-control transaction (the election of a control slate to MindMed's Board of Directors). FAC ¶¶ 6, 70. MindMed's Board of Directors is up for reelection each year, creating a substantial likelihood that Defendants will attempt another proxy contest with the same tactics in violation of Section 14(a). Where, as here, "the background of . . . battle for corporate control strongly suggests that future transgressions may occur," enjoining parties "from future violations of Section 14(a) and all applicable provisions of the securities laws and SEC regulations" is appropriate to "to dissuade [them] from future transgressions of the securities law." *Kaufman*, 719 F. Supp. at 186.[8]

Defendants' suggestion that MindMed is required to show, at the pleading stage, "actual success on the merits" is completely untethered to the law. *See* MTD at 18. The only case Defendants cite for this proposition considered a motion for permanent injunction, which is not at issue here. *See Bobrowsky v. Curran*, 333 F. Supp. 2d 159, 162 (S.D.N.Y. 2004). But regardless, MindMed has demonstrated a likelihood of success on its Section 14(a) claim. To recover under Section 14(a) and Rule 14a–9, a plaintiff must show "(1) a proxy statement contained a material misrepresentation or omission, which (2) caused plaintiffs' injury, and (3) the proxy solicitation

[8] Defendants' case law, most of which assesses irreparable harm in the context of motions for preliminary or permanent injunctions, does not change this analysis. *See* MTD at 16-17. Indeed, *Salomon Bros. Mun. Partners Fund, Inc. v. Thornton*, 410 F. Supp. 2d 330, 332 (S.D.N.Y. 2006), expressly noted that "[c]ourts have found irreparable harm . . . in situations when the company faces a possible change of control." Defendants' lone case dismissing a request for permanent injunctive relief at the pleading stage involved a challenge to predatory lending practices. *See Vaughn v. Consumer Home Mortg., Inc.*, 293 F. Supp. 2d 206, 213–14 (E.D.N.Y. 2003). In that case, the plaintiffs' alleged irreparable harm was the "increased likelihood" that they would be victimized by the same predatory lending schemes already experienced. However, the court found it unlikely that plaintiffs would again "become[] victims of this [same] scheme." *Id.* at 214. The circumstances here are inapposite as MindMed has no control over whether Defendants will continue to disseminate materially false and misleading proxy materials.

itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *Bond Opportunity Fund v. Unilab Corp.*, 87 F. App'x 772, 773 (2d Cir. 2004). The FAC makes clear that MindMed is likely to establish each of these elements.

Defendants issued materially false and/or misleading misstatements and omissions through the FCM Proxy Solicitation Materials in connection with the 2023 Proxy Contest in an effort to install the FCM Nominees on MindMed's Board. *See* FAC ¶¶ 70-74, 77-144. Although Defendants did not prevail in taking over MindMed's Board, they succeeded in obtaining, in their own words, "Significant Support from Shareholders" and in delaying the final certification of the 2023 AGM vote. *See id.* ¶¶ 147, 149-150; FAC Ex. N; § II.B.1 *infra*. In response to the FCM Proxy Solicitation Materials, MindMed was forced to expend millions of dollars in connection with the 2023 Proxy Contest, diverting resources MindMed would have otherwise allocated to its core operations that are the value proposition for investors. *See id.* ¶¶ 8, 152-153, 163.[9]

B. Defendants' Rule 12(b)(6) Motion Should Be Denied Because MindMed Has Stated a Cognizable Claim for Relief.

"A district court may grant a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) only if it appears beyond doubt that the non-moving party could prove no set of facts that would entitle it to relief." *Matusovsky v. Merrill Lynch*, 186 F. Supp. 2d 397, 399–400 (S.D.N.Y. 2002). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,

[9] Defendants cursorily state in a footnote that MindMed's request for an award of attorneys' fees is insufficient to confer standing without citing any legal authority. *See* MTD at 18 n.5. MindMed is under no obligation to respond to this completely undeveloped legal argument. *See Abdou v. Walker*, 2022 WL 3334700, at *3 (S.D.N.Y. Aug. 12, 2022) (quoting *Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005)) ("[A]rguments raised in 'a single conclusory sentence' are waived.").

556 U.S. 662, 678 (2009). Moreover, on a Rule 12(b)(6) motion to dismiss, "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered." *Samuels v. Air Transp. Loc. 504*, 992 F.2d 12, 15 (2d Cir. 1993).

1. MindMed has adequately pled transaction causation.

Defendants contend that MindMed cannot plead transaction causation because the Company ultimately prevailed in the 2023 Proxy Contest. But none of the cases Defendants cite support their position. For example, Defendants rely on *Enzo 1* in arguing that, "having won the proxy contest, MindMed has no viable claim for a violation of § 14(a) and Rule 14a-9 as a matter of law." *See* MTD at 11. But *Enzo 1*'s particularized factual analysis concerning transaction causation *in that case* contains no such general holding. *See Enzo 1*, 2021 WL 4443258, at *10. Indeed, less than two months after issuing the *Enzo 1* decision, Judge Crotty issued a decision in that same case expressly declining to address whether "statements intended to impact a transaction must, as a matter of law, actually succeed in that effort in order to be actionable." *Enzo Biochem, Inc. v. Harbert Discovery Fund, LP*, 2021 WL 5854075, *7 n.12 (S.D.N.Y. Dec. 9, 2021) (Crotty, J.) ("*Enzo 2*"). In *Enzo 2*, Judge Crotty made clear that he was not "foreclos[ing] the argument that transaction causation might be satisfied where the proxy solicitations at issue caused a claimant to incur pre-transaction expenses in order to nullify or mitigate the impact of those proxy solicitations on the transaction that would have occurred but for that intervention." *Id.*[10]

[10] The other cases cited by Defendants are similarly inapposite. *DCML LLC v. Danka Bus. Sys. PLC* involved material misstatements in connection with a liquidation transaction, not the election of directors, and no harm was alleged relating to a proxy vote. *See* 2008 WL 5069528, *3 (S.D.N.Y. Nov. 26, 2008). DCML instead claimed "that the false statements contained in the Danka proxy materials caused market participants to doubt the financial health of Danka." *Id.* Thus, DCML (unlike MindMed) did not allege harm to shareholder suffrage, which is precisely what Section 14(a) was enacted to protect. In *Heil v. Lebowthe*, 1993 WL 15032, at *3 (S.D.N.Y. Jan. 13, 1993), the court held that, "[b]ecause the Proposed 1990 Restructuring was not

Moreover, in asking this Court to insulate them from liability, Defendants ignore that Congress enacted Section 14(a) to "ensur[e] that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (quoting S. Rep. No. 792, 73d Cong., 2d Sess., 12 (1934)); *see also Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 129 (S.D.N.Y. 2001) (Cote, J.) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246(1988)) ("In passing the Securities Exchange Act of 1934 . . . Congress 'expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets[.]'"). In *Mills*, the Supreme Court rejected the argument that "all liability [under Section 14(a)]" would be "foreclosed on the basis of a finding that [a] merger was fair" because doing so would "insulate from private redress an entire category of proxy violations . . . [e]ven outrageous misrepresentations in a proxy solicitation" and "subvert the congressional purpose of ensuring full and fair disclosure to shareholders." 396 U.S. at 381-382. In rejecting a merger's fairness as a "complete defense," the Supreme Court also noted that "[u]se of a solicitation that is materially misleading is itself a violation of law" and that "injunctive relief" sought prior to a stockholder's meeting "would be available to remedy such a defect." *Id.* at 382-383; *see also Camelot Indus. Corp. v. Vista Res., Inc.*, 535 F. Supp. 1174, 1184 (S.D.N.Y. 1982) (adjourning shareholder meeting and requiring resolicitation of proxies to correct misstatements in proxy statements "[i[n]

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consummated, Plaintiff cannot show the fundamental requirement that the proxy solicitation caused him injury." By contrast, MindMed has specifically pled injury. *See* FAC ¶¶ 8, 152-153. And in *Gen. Elec. Co. by Levit v. Cathcart*, the Third Circuit declined to find transaction causation because "the mere fact that omissions in proxy materials, by permitting directors to win re-election, indirectly lead to financial loss through mismanagement will not create a sufficient nexus with the alleged monetary loss." 980 F.2d 927, 933 (3d Cir. 1992). By contrast, MindMed's damages arise directly from Defendants' dissemination of the FCM Proxy Solicitation Materials, which as discussed *infra* had an essential effect on the proxy vote, creating an indisputable nexus between MindMed's damages and Defendants' illegal conduct.

order for . . . shareholders to receive full and fair information . . . ."). That injunctive relief is available before a transaction has even been voted upon also supports Congress's intent for Section 14(a) to encompass misleading misstatements regardless of whether they actually bring about a defendant's desired result. Cabining relief under Section 14(a) as Defendants request would be entirely inconsistent with this broad intent.

As Judge Crotty wrote in *Enzo 2*, transaction causation is adequately pled when a plaintiff has alleged "some 'essential' effect on the transaction." 2021 WL 5854075, *7 n.12 (citing *Bricklayers & Masons Loc. Union No. 5 Ohio Pension Fund v. Transocean Ltd.*, 866 F. Supp. 2d 223, 238 (S.D.N.Y. 2012)). The presence of an alleged "essential effect" is effectively a substitute for the "common-law fraud test of whether the injured party relied on the misrepresentation[.]" *Mills*, 396 U.S. at 380; *see also Szulik v. Tagliaferri*, 966 F. Supp. 2d 339, 366 (S.D.N.Y. 2013) (citing *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005)) ("Transaction causation . . . is akin to reliance."); *In re CMS Energy Sec. Litig.*, 403 F. Supp. 2d 625, 628 (E.D. Mich. 2005) (citing *Basic*, 485 U.S. at 248–249) ("Transaction causation essentially means that plaintiff has properly pled reliance on the actions of the defendant[.]"). In the context of a securities action, "(r)eliance by thousands of individuals . . . can scarcely be inquired into[.]" *Mills*, 396 U.S. at 380. Given the infeasibility of inquiring into whether each individual shareholder relied on a statement, courts use substitutes like the concept of transaction causation to establish a presumption that shareholders relied and acted upon the misleading misstatements at issue. *See Cromer Fin. Ltd.*, 205 F.R.D. at 129 (quoting *Basic*, 485 U.S. at 243 (1988)) (While reliance is "an essential element of a securities fraud cause of action, providing the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury,'. . . there is 'more than one way to demonstrate the causal connection.'").

Here, there can be no doubt that a significant number of MindMed shareholders relied on the FCM Proxy Solicitation Materials, and that Defendants' dissemination of those materials had an "essential effect" on the 2023 Proxy Contest. As alleged in the FAC, Dr. Freeman and FCM broadcasted their success in achieving "Significant Support from Shareholders," thanked their "fellow shareholders for their significant show of support at the AGM," and boasted that "FCM . . . won over 50% of the retail shareholder vote." FAC ¶ 147; FAC Ex. N. In other words, by FCM and Dr. Freeman's own admission, the FCM Proxy Solicitation Materials had a substantial and meaningful effect on the shareholder vote at the 2023 AGM, particularly among retail shareholders—notwithstanding the fact that MindMed expended considerable resources to mitigate the impact of the misinformation in the FCM Proxy Solicitation Materials. *See* FAC ¶ 8, 152-153, 163. Defendants also succeeded in delaying the final certification of the 2023 AGM vote by purporting to challenge the tabulation and then refusing to meet with the Inspector of Elections regarding their concerns. *See* FAC ¶ 149. As a result, the final certification did not take place until more than a month after the AGM. *See id.* ¶ 150.

Given the FAC's detailed allegations showing that the FCM Proxy Solicitation Materials achieved an "essential effect" on both the shareholder vote and the final certification of that vote, the Court should find that MindMed has adequately pled transaction causation.

2. Rule 9(b)'s heightened pleading standard does not apply here; but even if it did, MindMed has satisfied it.

Defendants argue that the FAC must be dismissed because it does not satisfy the heightened pleading standard of Rule 9(b). *See* MTD at 14-16. As an initial matter, the FAC alleges that Defendants were, at a minimum, *negligent*, *see* FAC ¶ 161, which is sufficient to state a claim under Section 14(a). *See Wilson v. Great Am. Indus., Inc.*, 855 F.2d 987, 995 (2d Cir. 1988) (citing *Gerstle v. Gamble–Skogmo, Inc.*, 478 F.2d 1281, 1298–1301, 1301 n. 20 (2d Cir. 1973)) ("Under

Rule 14a–9 . . . [l]iability can be imposed for negligently drafting a proxy statement."); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d 260, 321 (S.D.N.Y. 2010) ("[N]egligence is sufficient to establish liability under Section 14(a) and Rule 14a–9[.]"); *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009) (Posner, J.) ("Section 14(a) requires proof only that the proxy solicitation was misleading, implying at worst negligence by the issuer."). And where a Section 14(a) claim asserts liability on the basis of negligence, Rule 9(b)'s pleading standard does not apply. *See Fresno Cnty. Emps' Ret. Ass'n v. comScore, Inc.*, 268 F. Supp. 3d 526, 559-560 (S.D.N.Y. 2017) (holding that elevated pleading standard of Rule 9(b) did not apply to Section 14(a) claims based on negligence); *compare with Enzo 1*, 2021 WL 4443258, at *9 (applying Rule 9(b) heightened pleading standard where the "gravamen" of the Section 14(a) claim was "anchored in fraud," including allegations that the defendant had "engaged in secret backchannel discussions" and "failed to disclose their plan to take control of Enzo and force a fire sale").

However, even if Rule 9(b)'s heightened pleading standard did apply, the FAC clearly satisfies that standard. Under Rule 9(b), "[a] securities fraud complaint based on misstatements must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007) (quoting *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000)).

Here, Defendants raise no challenge to the FAC's allegations (1) identifying each statement, *see, e.g.*, FAC ¶¶ 80-86, 96-98, 105-109, 116-117, 124-125, 128-130, 136-139, (2) identifying when and where the statement was made, *see, e.g.*, FAC ¶¶ 72-74, 85-86, 97-98, 106-108, 116, 136-137, or (3) explaining why the statements were materially false and/or misleading, *see, e.g.*, FAC ¶¶ 87-94, 99-103, 110-114, 119-122, 123, 126-127, 131-134, 141-144. Defendants' only challenge is feigned ignorance as to *who* is alleged to have made the statements at issue. *See* MTD at 14-16. The crux of Defendants' argument is that the FAC "seeks to hold all individual Defendants liable for statements in 'FCM's proxy solicitation' materials" and does not "attribute specific statements to the individual Defendants (or explain their authority to make such statements)[.]" MTD at 15.[11] However, Defendants fail to acknowledge that each of the FCM Proxy Solicitation Materials explicitly states that it was jointly filed by—and thus attributable to all—seven Defendants.

In April 2023, days before the 2023 Proxy Contest was initiated, Defendants entered into an agreement with one another to make joint securities regulatory filings. *See* FAC ¶ 70; *see also* FAC Ex. B at 26 ("On April 18, 2023, the FCM Nominees, FCM Holdings, Mr. Freeman and Mr. Boulanger entered into a joint filing and solicitation agreement (the 'JFSA') for the purpose of forming a group to seek representation on the Board. Under the JFSA, parties have agreed . . . to make joint securities regulatory filings to the extent required by applicable law[.]"). True to this agreement, all of the FCM Proxy Solicitation Materials cited in the FAC state on their face that they were filed by all seven Defendants. *See* FAC Exs. A-I and K-M. All of the Defendants are therefore "proper defendants" in this action. *See City of Roseville Emps' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) ("Because all of the Individual Defendants signed the July 2008 Registration Statement, all are proper defendants on the claims

[11] Defendants also claim that the FAC "refers to public statements made by non-party Freeman Capital Management LLC," MTD at 15; however, the FAC does not cite these as examples of actionable misstatements under Section 14(a). Rather it states that *prior* to the 2023 Proxy Contest Dr. Freeman, Jake Freeman, and FCM, used the social media usernames "FreemanCapitalMgmt" and "@capital_freeman," to post juvenile and inflammatory statements about MindMed, which calls into question the truth of specific statements Defendants then made in the FCM Proxy Solicitation Materials. *See* ¶¶ FAC 64, 95-101.

regarding alleged misstatements in that document.”).

Moreover, the FAC gives Defendants fair notice of MindMed’s claims, which seek to hold all Defendants responsible for all statements identified in the FAC, which are directly attributable to them as filers of the FCM Proxy Solicitation Materials. *See, e.g.*, *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 120 (S.D.N.Y. 2009) (finding defendants had sufficient notice of fraudulent actions for which plaintiffs sought to hold defendants liable where “plaintiff attribute[d] all misrepresentations, omissions, and fraudulent intent to all defendants, based on their relationship with the primary violator”).

Defendants’ reliance on *In re Banco Bradesco S.A. Sec. Litig*., 277 F. Supp. 3d 600 (S.D.N.Y. 2017), which abrogated the “group-pleading doctrine,” is misplaced. *See* MTD at 15. The group-pleading doctrine referred to “a presumption that group-published documents,” such as annual reports or press releases, could be attributed to individuals on the basis that those individuals were “corporate insiders.” *In re Banco*, 277 F. Supp. 3d at 640. But MindMed does not allege the statements in the FCM Proxy Solicitation Materials are attributable to Defendants by virtue of the fact that they were “corporate insiders”; rather it is because Defendants entered into an agreement to make joint filing statements and, pursuant to that agreement, each and every materially misleading and/or false statement alleged in the FAC was filed by and on behalf of each Defendant. *See* FAC ¶ 70; FAC Exs. A-I and K-M.

C. In the Alternative, MindMed Should Be Granted Leave to Amend.

Should the Court find that MindMed has not adequately pled its claims, MindMed respectfully requests leave to amend the FAC.[12] The Second Circuit recognizes that “[l]eave to

[12] MindMed has not previously requested leave to amend. MindMed amended its complaint once as a matter of right pursuant to Rule 15(a). *See* ECF Nos. 28 and 29; *see also Gaming Mktg. Sols., Inc. v. Cross*, 528 F. Supp. 2d 403, 406 (S.D.N.Y. 2007).

amend should be freely granted . . . [and] outright refusal to grant the leave without any justifying reason for the denial is an abuse of discretion." *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 33 F. Supp. 3d 401, 446–447 (S.D.N.Y. 2014) (citing *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990)) ("[U]pon granting a motion to dismiss, the 'usual practice' in this Circuit is to permit amendment of the complaint.").

Additionally, "[t]he Second Circuit has instructed Courts not to dismiss a complaint 'without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.'" *Babyrev v. Lanotte*, 2018 WL 388850, at *8 (S.D.N.Y. Jan. 11, 2018) (quoting *Shabazz v. Bezio*, 511 Fed.Appx. 28, 31 (2d Cir. 2013)). This is particularly true if the court dismisses a complaint for failure to satisfy the minimum pleading standards under Rule 9(b). *See Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986) (quoting 2A J. Moore & J. Lucas, Moore's Federal Practice, ¶ 9.03 at 9–34 (2d ed. 1986)) ("Complaints dismissed under Rule 9(b) are 'almost always' dismissed with leave to amend.").

Accordingly, in the event the Court determines that the FAC should be dismissed, MindMed respectfully requests leave to amend the FAC to rectify any defects found by the Court.

CONCLUSION

For the foregoing reasons, MindMed respectfully requests that the Court deny Defendants' Motion to Dismiss. In the alternative, MindMed requests leave to amend the FAC so that it may cure any defect found by the Court.

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Respectfully submitted,

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